JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 103/2004

MOTION NO: 05/2005

BEFORE: **THE HON MR JUSTICE P. HARRISON, J.A.**
THE HON MR JUSTICE PANTON, J.A.
THE HON MRS JUSTICE McCALLA, J.A. (AG.)

BETWEEN:	**PAULETTE BAILEY** **EDWARD BAILEY**	**APPELLANTS/DEFENDANTS**
AND	**INCORPORATED LAY BODY OF THE CHURCH IN JAMAICA AND THE CAYMAN ISLANDS IN THE PROVINCE OF THE WEST INDIES**	**RESPONDENT/CLAIMANT**

W. John Vassell, Q.C., and Courtney Bailey instructed by DunnCox for applicant/respondent

Gayle Nelson instructed by Gayle Nelson & Company for the respondent/appellant

February 21, 22 and May 25, 2005

HARRISON, J.A:

This is an application to set aside leave to appeal granted by Campbell, J on October 22, 2004, from his order made on October 14, 2004, refusing an application for variation of Case Management timetable in order to file an amended defence and a witness statement of one Superintendent Carl Major.

Amendments of the statements of case under the current Civil Procedure Rules 2002, (unlike the former Civil Procedure Code Law) which permitted amendments at any stage of the proceedings – are allowed within controlled stages. Rule 20.1 provides, generally:

> "20.1 A party may amend a statement of case at any time before the case management conference without the court's permission ..."

The court's permission may be obtained on application but its discretion is not unlimited. Rule 20.4 (2) reads:

> "(2) The court may not give permission to amend a statement of case after the first case management conference unless the party wishing to make the amendment can satisfy the court that the amendment is necessary because of some change in the circumstances which became known after the date of that case management conference."

A Case Management Conference was held on October 6, 2003, in respect of the writ and statement of claim filed on July 31, 2002, and various orders were made. Included therein was the pre-trial review fixed for January 20, 2004, and the trial fixed for April 29 and 30, 2004.

The appellants/defendants Paulette and Edward Bailey ("the Bailey descendants") applied on November 26, 2003, to vary the Case Management timetable and obtain further orders, including an amendment that the name "Evadney" be substituted by the name

"Ina". The permission to amend was granted by Anderson, J on January 20, 2004. However, the amended defence filed on February 6, 2004, included an allegation of fraud, namely that:

> "... the signature of Ina M. Bailey was secured by fraud."

This was an amendment not ordered by Anderson, J.

Consequently, the respondent/claimant ("the Church") applied on March 8, 2004, that the unauthorized portions of the amended defence be struck out on the ground, inter alia, that there was no evidence of change in circumstances arising after the Case Management Conference on October 6, 2003.

On the trial date on April 24, 2004, Mrs. Justice Marva McIntosh granted an adjournment and fixed a second Case Management Conference for October 14, 2004, when Campbell, J refused the application for variation of the timetable and adjourned the Case Management which he completed on October 22, 2004, and gave leave to appeal. In his reasons Campbell, J, inter alia, said:

> "... The Defendants have not satisfied the Court that the Amendment sought is necessary because of some change in circumstances taking place after the Case Management Conference."

As stated earlier, this is an appeal from the said leave granted.

The over-riding objective of the new Rules of Procedure is the prompt disposal of cases and saving expense, in doing justice between the parties.

Rule 1.8(9) of the Court of Appeal Rules 2002 reads:

> "The general rule is that permission to appeal will only be given if the Court or the Court below considers that an appeal will have a real chance of success."

In ***Swain v Hillman*** [2001] 1 All ER 91, a case relied on by Mr Vassell, Q.C., in construing the term "real prospect" of success, which term is employed in Rule 52.13(6) of the Civil Procedure Rules, 1998 (UK), which is in pari materia with Rule 1.8(9), Lord Woolf, Master of the Rolls said that the said words:

> "... direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

The question which arises in the instant application is, whether or not there is any "real chance of success" in respect of the appeal from the order of Campbell, J refusing the application to amend the defence to include the allegation of fraud.

From the outset, the defence filed dated November 28, 2002, in paragraph 1, p. 4, of the record, reads:

> "1. The Defendants deny that Miss Ina Louise Bailey transferred to herself and the Plaintiff all the estate and interest in **ALL THAT** parcel of land part of Kensington Crescent in the parish of Saint Andrew as she

> was suffering from senility at that time and hence incapable of understanding the nature of the contract."

This was a reference to the transfer on May 27, 1977. Implicit in this pleading is not a denial that Ina did sign, but that because of her senility then, she was unable to understand "the nature of the contract." The defendants' answers dated July 7, 2003, to the request for further and better particulars emphasize that stance.

Furthermore, the witness statement of Paulette Bailey, one of the Bailey descendants, dated November 26, 2003, inter alia reads:

> "10. ... in 1973 Aunt Ina's emphysema got worst ... Aunt Ina has always been sick ... She had a permanent shaking disorder which affected her hands and feet. In fact Aunt Ina could not hold a pen to write. Aunt Amy wrote for her sometimes if there was a need to."
> (Emphasis added)

She further stated that Aunt Ina could hold a conversation for 10-15 minutes "then start talking about something else." In Christmas of 1976, they conversed, although she, Paulette, had to identify herself to Aunt Ina who "five minutes after would ask my name again." She disclosed still further:

> "I had to write for her on some occasions."

That statement revealed that up to December 1976, Ina Bailey was able to converse freely, despite moments of forgetfulness. She

was also able to communicate in order to be able to tell both Amy Bailey and Paulette Bailey what "to write for her."

The statement dated November 26 2003, was available when the notice of application to vary Case Management timetable also dated November 26, 2003, was filed on November 26, 2003. This application was not heard until January 20, 2004, by Anderson, J at the pre-trial review, when the said statement and that of Junior Goldson dated November 25, 2003, were ordered to be filed and served. On the facts disclosed in the said statements and which facts were known to the Bailey descendants, an allegation of fraud by a forged signature could have been pleaded up to January 20, 2004, and proved by these witnesses from their personal knowledge without reference to expert evidence. No such allegation of fraud was made.

Moreover, Paulette Bailey was well aware that both she and Amy Bailey would write for Ina Bailey at times, on Ina Bailey's authorization. Even if Amy Bailey signed Ina Bailey's name, although there is no evidence that she did it is not forgery. A signature is valid and legal when one signs the name of another on the latter's authorization. The authors of Criminal Law by Smith and Hogan, 7th Edition, on page 673, stated:

> "... an instrument may be valid though not signed by the maker so long as it is signed on his authority ... If the instrument is valid because the signature is authorized, it would

> be absurd to say that it is a false instrument and such an instrument may properly be regarded as being made by the person ... authorizing the use of his signature."

No new matter therefore arose since the first Case Management Conference on October 6, 2003. All the facts were well known to the Bailey descendants from the outset, but no allegation of fraud was made. No evidence was put forward before Campbell, J. on October 14, 2004, in order to prove any new circumstances arising. The learned judge was therefore correct to refuse the application for a further amendment of the defence.

Any appeal against his order, therefore would have no real chance of success.

I would grant the application to set aside the leave to appeal which was granted, with costs to the Church.

PANTON, J.A.

1. On October 14, 2004, Campbell, J., while presiding in Chambers at a case management conference, refused an application by Paulette and Edward Bailey (the Baileys) for the amendment of their defence and counterclaim in a suit brought by the Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the Province of the West Indies (the Church). On October 22, 2004, the conference having been adjourned to that day, he ordered the Baileys to give, within thirty days of his order, a true account of all monies collected by them as rental from tenants in occupation of number 8 Kensington Crescent, St. Andrew. He also gave them leave to appeal. This motion before us seeks to set aside that permission to appeal.

2. The circumstances leading to this motion are simple. In July, 2002, the Church filed a claim against the Baileys for recovery of possession of the premises at Kensington Crescent. It also sought an account of monies collected as rental, and an order for payment of any amount found due on the taking of the account. There followed the usual entry of appearance and the filing of a defence and counter-claim.

3. A case management conference was held on October 6, 2003, and the trial was fixed for April 29 and 30, 2004. The Baileys subsequently applied for a variation of the case management time-table, and for permission to amend the defence and counter-claim and further and better particulars. This application

was dealt with on January 20, 2004, by Anderson, J. who duly granted permission to amend. Other orders were made at this hearing in relation to disclosure, the filing of skeleton arguments, and the length of addresses.

4. On March 8, 2004, the Church applied for the amended defence and counter-claim filed by the Baileys to be struck out or, in the alternative, for the purported amendments which were outside the permission granted on January 20, 2004, to be struck out.

5. When the matter came up for trial on April 29, 2004, instead of the trial being proceeded with, an order was made for another case management conference to be held on October 14, 2004. On the day before this latter fixture, the Baileys filed a further notice of application for variation of the case management time-table. They sought, among other things, permission to amend the defence and counter-claim in keeping with the terms of a draft which was attached. At the conference held on October 14, as indicated in paragraph 1 (above) Campbell, J. refused the application. He fixed a pre-trial review for June 16, 2005, and adjourned the case management conference to October 22, 2004.

6. It was at the resumed hearing on October 22, that the learned judge made the order for the Baileys to account in respect of the rental sums collected. It was then that he also gave leave to appeal. The Baileys accepted the grant of leave and filed an appeal on November 5, 2004. The Church challenges the grant of leave on the basis that the appeal has no real chance of success.

7. Campbell, J., in setting out his reasons for refusing the application to amend the defence and counter-claim, referred to the Civil Procedure Rules, 2002, which came into operation on January 1, 2003. He relied on the provisions of Rule 20.4 (2) in particular. The rule reads thus:

> "20.4 (1) An application for permission to amend a statement of case may be made at the case management conference.
>
> (2) The court may not give permission to amend a statement of case after the first case management conference unless the party wishing to make the amendment can satisfy the court that the amendment is necessary because of some change in the circumstances which became known after the date of that case management conference".

The learned judge at page 160 of the record of appeal said in his judgment:

> "The amendments sought relate to something that would have taken place from 1984, the time of Amy Bailey's death. Yet, after case management conference and pre-trial review and aborted trial the Court is only now being presented with this application. The Court has to look at the justice of the case. It is clear to me that the defendants have not satisfied the Court that the amendment sought is necessary because of some change in circumstances taking place after the case management conference".

8. Without going into the merits of the suit which is yet to be tried, it is necessary at this point to state the basic features of the claim, defence and counter-claim. In 1977, Amy, Ina and Evadne Bailey transferred "all the estate and interest" in the property in question to themselves and the Church "for their

natural lives and after their death to the plaintiff ", that is, to the Church. In 1986, the said Amy, Ina, and Evadne Bailey along with Elsie and Anna Bailey as well as the Church entered into an agreement which provided that the Church agreed that should Elsie, Anna or Gertrude Bailey survive Amy, Ina and Evadne, the premises should "remain in the possession of the surviving members of the family or until they agree to hand it over to the Diocese". The said Amy, Ina, Evadne, Elsie, Anna and Gertrude Bailey and/or relatives of theirs put tenants (the defendants in the suit) in possession of the said premises. These ladies are all now deceased, but the Baileys listed as defendants have wrongfully remained in possession.

9. The Baileys deny that they are wrongfully in possession. They deny that Ina and Anna had the capacity to make the agreement referred to in the statement of claim as they were both suffering from senility which was one of the main causes of the death of Anna in April, 1989. The Baileys are contending that specific instructions had been left by William F. Bailey (who owned the property earlier) for the property to be left in trust for the Diocese to be used as a charitable home for the aged after the last living blood descendants of the Bailey family is no more. The Baileys state that they are the last living blood descendants described by William F. Bailey. In their counter-claim, they seek one-half of the total sum spent by them on the premises for maintenance and taxes. In the further draft amended defence which was disallowed by Campbell,

J., the Baileys sought for the first time to introduce the element of fraud, by suggesting that Ina Bailey's signature was fraudulent.

10. Mr. Vassell, on behalf of the Church, submitted that the judge's order was unassailable and that the appeal is hopeless. The judge, he said, should have refused leave since that is what is mandated by Rule 1.8 (9) of the Court of Appeal Rules 2002. For the permission to appeal to stand, the Baileys would have to show that there is a "real chance of success". He referred to the skeleton argument which suggested that the test to be applied as to whether permission to appeal should be granted is substantially the same as the test as to whether or not summary judgment should be granted. In that regard, reliance was placed on the cases **Swain v. Hillman** [2001] 1 All E.R. 91 at 92j and **Tanfern Ltd. v. Cameron-MacDonald** [2000] 2 All E.R. 801. In the circumstances, he submitted that this Court should exercise its power under Rule 1.13(b) of the Court of Appeal Rules 2002. The power given by that Rule, he said, should be exercised in every case where a judge below either overlooks Rule 1.8(9) or applies the provision without the required stringency.

11. Mr. Nelson, for the Baileys, submitted that by granting leave to appeal, Campbell, J. was expressing his view that there were circumstances for the Court of Appeal to address and pronounce on. In answer to a question from this Court, Mr. Nelson said that from very early in the proceedings he was aware that Ina had not signed the document. However, at the first case management conference, although that was the state of knowledge of the Baileys, this

position was not being advanced then as they did not have the handwriting expert's report (which they now have). To quote his words to the Court: " I was well aware of the allegation of fraud before filing the defence, but I did not get the evidence though. We can only put in pleadings what we believe we can prove. My client said she knew her (Ina's) handwriting, and it was not her signature".

12. Mr. Nelson agreed that the interpretation of Rule 20.4(2) was crucial for the determination of this matter. He agreed also that there had to be something new, in the form of an issue, as opposed to evidence, for it to be regarded that there had been a "change in circumstances" as contemplated by the rule. Later, however, he submitted that "issue" and "evidence" were the same. This seemed to be a contradictory position. In any event, he conceded that the pleadings could have been drawn from the very beginning alleging fraud without the handwriting expert's report being to hand. This could have been done because he had an opinion from one of the Baileys that she knew Ina's handwriting, and it was not hers.

13. The approach of Mr. Nelson was one in which he substantially ignored the new rules, and placed reliance instead on those cases that, he said, discouraged the striking out of appeals. For example, he referred to **Burgess v. Stafford Hotel Ltd.** (1990) 1 W.L.R. 1215, and pointed to the words of Glidewell, L.J., at page 1222, while sitting in the English Court of Appeal:

> "In my view, the power to strike out should be confined to clear and obvious cases".

I do not think that I would be doing any injustice to Mr. Nelson were I to point out that the context in which Glidewell, L.J.'s words appear does not really support his argument. Indeed, this is what Glidewell, L.J. said:

> "The jurisdiction to make orders striking out notices of appeal is one that is just as capable of abuse as is the power to put in hopeless notices of appeal. In my view the power to strike out should be confined to clear and obvious cases. It should not be utilised, and an order should not be made, where any extensive enquiry into the facts is likely to be necessary. But in this case that situation does not arise. I would therefore have granted the application made by the landlord to strike out had the matter come before me in a court of which I was a member at an earlier stage".

14. The case **Thomas v. Morrison** (1970) 12 J.L.R. 203, a decision of this Court, was also prayed in aid by Mr. Nelson. In that matter, at the commencement of a trial in the Supreme Court, the judge granted an amendment of the statement of claim, but refused to adjourn for the defence to be amended. Instead, he ruled that the amended defence may be filed at any time during the hearing. The trial proceeded and judgment was entered in favour of the plaintiff. In the statement of claim, there had been an allegation that the defendant had "fraudulently and/or wrongfully obtained" a certificate of title in respect of a parcel of land of approximately 3/4 acre situated at Saa Hill Pen, St. Catherine. The defendant denied the allegation. The amended claim added certain particulars of fraud. On appeal, it was contended that it was wrong for the judge to have allowed the amendment to include fraud, seeing that the

statement of claim without the amendment had not effectively raised the issue of fraud, and that there had been unjustifiable delay in making the application for the amendment. It was held, inter alia, that:

> (1) "a general allegation of fraud is not sufficient to be supported by evidence at the trial;"
>
> (2) "in a proper case, an amendment to add particulars of fraud may be made before or at the trial before evidence is led in that regard;"
>
> (3) "an amendment should always be allowed if it can be made without injustice to the other side;" and
>
> (4) "the particulars of fraud sought to be introduced where originally there were none did not raise any new cause of action or any different case of fraud from that originally pleaded."

Although the appeal was allowed, this case does not help the argument put forward by Mr. Nelson as it was the refusal to grant the adjournment that caused the appellant to succeed; substantial injustice had been done to her, the Court held. In respect of the amendment of the claim to include the particulars of fraud, this was acceptable as no new cause of action was being put forward. Fraud had originally been pleaded. In the instant case, fraud had not been originally pleaded. In addition, there is the clear distinguishing feature between that case and this in that there are new rules to govern matters of this nature - rules that did not exist in 1970 when the Court made its decision in **Thomas v. Morrison.**

15. Another case relied on by Mr. Nelson was the oft-referred to **Cropper v. Smith** (1884) 26 Ch.D.700. However, it has to be noted that that which he urged on us came from the dissenting judgment of Bowen, L.J. This learned judge expressed himself in terms with which very few would disagree so far as the overall objective of justice is concerned, but in the end his learned colleagues saw the question of the amendment of the pleadings in the case in a very different light. Lord Justice Bowen, at page 710, said:

> "Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy..".

At page 710 to 711, he continued thus:

> "Order 28 rule 1 of the Rules of 1883, which follows previous legislation on the subject, says that 'all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties'. It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right ...I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs".

16. I find it extremely difficult to understand how Mr. Nelson could expect the Court to accept Bowen, L.J.'s view based as it was on the English Rules of one and a quarter of a century ago, yet deny the clear interpretation of our own current Rules which are saying something completely different. Following such an approach would without doubt result in the Jamaican Courts being placed in a time warp. No one will doubt that in 1884 when Bowen, L.J. was delivering his

judgment, the situation then was that "there was one panacea which heals every sore in litigation, and that is costs". Since then, the world has changed significantly. Men have been on the moon, computers are in every cornerstore, communication is instant in every sense of the word. It is no longer so, if it ever were so, that the panacea for every sore in litigation is costs. Human beings are more conscious of how their time is spent, and not everything may be valued in dollars and cents or pounds and pence. There is a further consideration which is of supreme importance in today's world. It has to do with the length of time that Courts take to bring issues to finality. In order that the Court may maintain its place as the rightful decider of issues, it needs to do so in a timely fashion, giving due consideration to difficulties that parties may encounter along the way in the preparation and presentation of their cases, but not countenancing shifts in positions and strategies that have the apparent intention of prolonging proceedings, and frustrating those who wish to have their legitimate rights recognized and enforced.

17. In the instant case, it is important to first of all appreciate that Rule 1.8(9) of the Court of Appeal Rules 2002 provides that, as a general rule, permission to appeal in civil cases will only be given if the Court of Appeal or the Court below considers that an appeal has "a real chance of success". Rule 1.13 of the same Rules gives the Court of Appeal the power to set aside permission to appeal in whole or in part. It is this jurisdiction of the Court of Appeal that is being

invoked. I think that this may well be the first time that an application of this nature is being made before this Court under these Rules.

18. In considering the merits of the application, it is therefore necessary to look at the provisions of Rule 20.4(2) of the Civil Procedure Rules 2002, which was set out earlier in paragraph 7 herein. The rule clearly states that the court may not give permission to amend a statement of case after the first case management conference unless the party seeking the amendment is able to satisfy the court that the amendment is necessary due to some change in the circumstances which became known after the date of the case management conference. Although it is fashionable at times for simple words to be given complicated meanings, this is not possible in this situation. There is nothing that has been pointed to, or can be pointed to, that indicates a change of circumstances since that case management conference. That being so, the learned judge erred in giving leave to appeal. There was absolutely no basis for the judge's decision to grant leave, and he himself said so.

19. In my view, the Baileys have not been able to overcome the hurdle that has been placed in their way by Rule 20.4 (2) of the Civil Procedure Rules 2002. They have no real chance of succeeding on the appeal as the hurdle is insurmountable. The action of the Baileys since the case management conference may be interpreted as aimed at delaying the trial which should have taken place more than a year ago. That is most unfortunate, given the historical situation that gave birth to the Civil Procedure Rules 2002. For many years,

litigants with no chance of success frustrated the system, preventing the timely disposition of matters by employing every possible delaying tactic. In the process, the Courts gained the reputation in some quarters of being supportive of dilatoriness. The 2002 Rules are aimed at changing that perspective, and providing litigants with speedy justice. The Courts cannot now, without very good reason, countenance disobedience of these Rules, and say simply that the panacea is "costs". Those days are gone.

20. I would grant this application, and set aside the permission for appeal granted by Campbell, J. I would also make an order for costs against the Baileys in favour of the Church.

McCALLA J.A. (Ag.):

1. In July 2000, the respondent, Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the Province of the West Indies ("the Church") filed a Writ of Summons against the appellants Paulette and Edward Bailey, ("the Baileys") seeking recovery of possession of property on Kensington Crescent, St. Andrew, ("the premises") among other reliefs.

2. The issues for determination are whether or not Campbell J wrongly exercised his discretion in refusing to grant an amendment to permit the Baileys to allege and particularize fraud in their defence and counterclaim and whether or not permission to appeal granted by him ought to be set aside.

3. It is necessary therefore to give a brief history of the events leading up to the application for amendment.

4. In 1977 the Bailey sisters Amy, Ina and Evadney effected a transfer of the premises to the Church and themselves for the term of their natural lives and after their deaths to the Church.

5. In August, 1986 those three Bailey sisters entered into another agreement with the Church for the premises to remain in the possession of three other Bailey sisters namely Elsie, Anna and Gertrude until after the deaths of the latter three sisters. The agreement also stipulated that

should any of those other sisters survive Amy, Ina and Evadney, the premises would remain in the possession of the surviving member of the family or until there was any agreement to hand it over to the Church.

6. Tenants were put in possession of the premises by all the sisters. All six Bailey sisters are now deceased. The Baileys are the grandniece and nephew of Elsie Bailey, one of the deceased sisters and the church has brought the claim against them for being wrongfully in possession of the premises and collecting rent from the tenants.

7. In their defence and counterclaim which was filed in October, 2002, the Baileys deny that Evadney (subsequently amended to read Ina) Bailey had transferred the premises "as she was suffering from senility at that time and hence incapable of understanding the nature of the contract".

8. It is also denied that Ina and Anna had the capacity to make the 1986 Agreement as they were both then suffering from senility.

9. Relevant events in the life of the claim as chronicled on the record, are as follows:

31st July, 2002	-	Writ of Summons filed
9th October,2002	-	Appearance entered
4th December,2002	-	Defence and counter-claim served
7th July, 2002	-	Answer to request for further and better particulars
6th October, 2003	-	Case Management Conference
26th November 2003		Application for variation of case management timetable
20th January, 2004	-	Pre-Trial Review"

10. At the Pre-Trial Review the Baileys were granted permission to amend their defence and counterclaim as well as the further and better particulars by "substituting the name Evadney Bailey wherever it appears, for the name Ina Bailey".

11. On 6th February, 2004, the Baileys filed an amended defence and counterclaim which alleged and particularized fraud and was therefore in excess of the permission to amend which had been granted at the Pre-Trial Review.

12. On March 8, 2004 the church applied for the amended defence to be struck out or in the alternative, the words which exceeded the permission granted, be struck out.

13. When the matter came up for trial on the April 29, 2004, on the application of the Baileys, Marva McIntosh J granted an adjournment with costs $142,000.00 to be paid to the church. The Court also made an order that the matter be set for a case management conference on October 14, 2004.

14. On October 13, 2004, the Baileys filed a Notice of Application to vary case management timetable and sought permission to further amend their defence and, to plead and particularize fraud.

15. At the second case management conference on October 14, 2004, Campbell J refused the Baileys' application for the amendments sought and at an adjourned hearing on 22nd October, 2004 he granted the

Baileys leave to appeal his earlier order. Consequently, the Baileys filed notice and grounds of appeal. On 5th November, 2004 the Church filed an application seeking to set aside the permission to appeal the order which had been granted by Campbell J. It is that application with which this court is now concerned.

16. In arguing that permission to appeal ought to be set aside, the Church places reliance on Rule 1.8(9) of the Court of Appeal Rules 2002 which provides as follows:-

> "The general rule is that permission to appeal will only be given if the Court or the Court below considers that an appeal will have a real chance of success".

17. Referring to Rule 15.2,(6)(a) the English Civil Procedure which is similar to Rule 1.8(9) of the Court of Appeal Rules, counsel for the Church Mr. John Vassell, Q.C. submits that the test to be applied is that the litigant has no real prospect of success. He cited the case of ***Swain v Hillman*** [2001]1 All ER 91 at page 92 where the learned judge stated that the court should consider whether there was a realistic as opposed to a fanciful prospect of success.

18. He argued that the appeal by the Baileys has no chance or prospect of success and permission to appeal was wrongly granted and should be set aside.

19. Mr. Vassell Q.C. pointed out that with regard to the amendments sought, Campbell, J had said that the Baileys had failed to satisfy him that the amendments were necessary because of some change in circumstances which had taken place after the first case management conference. He said that no such material had been placed before the learned judge by affidavit, as required by Rule 11.9(2) of the Civil Procedure Rules 2002. Rule 20.4(2) clearly restricts the exercise of the judge's discretion to grant such permission unless the requirements of the section are satisfied.

Rule 20.4(2) provides that:

> "The court **may not give permission** to amend a statement of case after the first case management conference unless the party wishing to make the amendment can satisfy the court that the amendment is necessary because of some change in the circumstances which became known after the date of that case management conference." (emphasis added).

Mr. Vassell also submitted that certain findings of facts and law set out in the Notice of Appeal filed by the Baileys are not a part of the reasons given by the learned judge for his decision and the appeal against the decision on the basis of a challenge to those findings is destined to fail.

20. Mr. Gayle Nelson for the Baileys relies on the fact that McIntosh J had granted an adjournment of the trial with the conditions stipulated. He also relies on the fact that Campbell J had granted permission to appeal. Mr. Nelson asserts that when Campbell J said in his written

reasons for judgment that he had enumerated the church's protests in his oral judgment such protests were important to his case but they were omitted from the judgment, which had been reduced to writing by the Church, and submitted to the learned judge. They formed the basis of his challenges at 2 (f) and 2 (g) of his notice of appeal.

21. Mr. Nelson cited a number of cases which dealt with applications for amendments and the circumstances in which amendments were granted. It is necessary to refer to two of those cases only.

22. He referred to a passage in ***Copper v Smith*** [1884] 26Ch.D 700 C.A. at p. 710 where Bowen, LJ said in part:

> "I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace."

In ***Rondell v Worsley*** [1967] 3All ER 993, guiding principles were enunciated by Lord Pearce, as to the court's approach to amendments. Where there appears to be good faith and a genuine case, the courts will allow extensive amendments almost up to the twelfth hour in order that the substance of a matter may be fairly tried.

23. Referring to the Civil Procedure Code Rules Section 676, which governed the matter at the date of filing of the writ of summons, Mr.

Nelson urged that the amendments sought ought to be granted however late, if it is necessary to decide the real issues in controversy.

24. He says it is unfair and unjust and not in accordance with the Civil Procedure Rules 2002, for Campbell J to have refused to grant the amendments sought, when the Baileys had paid the costs stipulated by the trail judge in granting the adjournment.

25. Mr. Nelson contends that Rule 1.8(9) of the Court of Appeal Rules is not applicable as leave to appeal was granted and the allegation of fraud is central to the Baileys' claim. If the 1977 agreement is found to be fraudulent, the premises would form a part of the Baileys' estate.

26. It now falls to be considered whether in the above circumstances Campbell J was correct in his refusal to grant the amendments sought and whether or not permission to appeal ought to be set aside.

27. Paragraphs 1 and 2 of the defence and counterclaim which is in response to averments at paragraph 2 of the statement of the claim which relates to the signing of the 1977 and 1986 agreements by the Bailey sisters states:

> "Para.1: The Defendants deny that Miss Ina Bailey transferred to herself and the Plaintiff all the estate and interest in all that parcel of land part of Kensington Crescent in the parish of St. Andrew as she was suffering from senility at that time and hence incapable of understanding the nature of the contract.

Para. 2: The defendants deny that Miss Ina Bailey and Anna Bailey Essien had the capacity to make such an agreement as they were both suffering from senility one of the main causes of the death of Anna Bailey Essein who dies in April, 1989."

The witness statement of Paulette Bailey dated November 2003 at paragraph 12 states:

> "I am certain that Aunt Ina could not hold a pen to sign her name to any transfer of the premises to the church **and would not know anything about it because of the ailments she was stricken with. From 1973 she had a permanent shaking disorder which crippled her hands and feet and she could not hold a pen to write".** (emphasis added)

28. The above paragraphs of the defence state that Ina did not sign any transfer of the premises. Paulette Bailey's witness statement shows that she was aware that the signature on the 1977 agreement was not the signature of Ina Bailey and Ina Bailey "would not have known anything about it". If Ina Bailey did not sign and did not know anything about the agreement, then an issue of fraud is raised. Nevertheless, there was a failure to plead fraud and particularize fraud. I am not unmindful of the authorities which say that counsel ought not to plead fraud without an evidential basis to support such a serious allegation. However, it my view that it was not the fact of the availability of the handwriting expert's report which revealed fraud.

29. When counsel for the Baileys sought to amend the defence at the second case management conference, to plead and particularize fraud it was therefore open to Campbell J in the exercise of his discretion, to refuse to grant the amendments sought.

The learned judge was correct in holding that the Baileys had failed to satisfy him that the amendments sought were necessary because of some change in circumstances after the first case management conference, as required by the Civil Procedure Rule 11.9(2). In any event no evidence had been placed before the court of any change in circumstances as required by rule 20.4(2).

30. Mr. Vassell Q.C. referred us to the case of **Ormiston Ken Boyea** of **Prospect, Hudson Williams** of Villa and **East Caribbean Flour Mills Limited** of Camden Park. St. Vincent and the Grenadines High Court Civil Appeal No. 3 of 2004. In that case there was an appeal from a decision of a trial judge who held that Civil Procedure Rules 20.1(3) (a provision substantially the same as CPR 20.4(2) allowed the trial court a discretion as to whether or not to grant permission to amend a statement of case.

The court considered arguments and authorities as to the interpretation to be accorded to the section.

At page 9 of the judgment, D'Auvergne J.A. (ag.) had this to say:

> "The discretion of the court to permit changes to statement of a case has to be considered with reference to CPR 20.1 (3), changes to be made after the first case management conference. It is

> my view that the overriding objective cannot be used to widen or enlarge what the specific section forbids".

31. Returning to the instant case, I am of the view that the order for costs granted by McIntosh J is of no assistance to the Baileys as she did not deal with the application for amendment.

Although this matter commenced before the enactment of the Civil Procedure Rule 2002, it is quite clear that these rules became effective in 2003 and this matter is now governed by the provisions of the rules.

The Civil Procedure Rules 2002 is a new code enacted to streamline the administration of Civil Procedure by making changes to the old order.

Section 20, save for the exceptions mentioned, makes provision for the statement of case to be amended without permission at any time before the first case management conference. Thereafter, it stipulates the requirements for subsequent amendments.

32. The learned judge in the circumstances refuse to grant the amendments sought for reasons stated by him. I am of the view that he was correct in so doing as section 20.4(2) clearly states that he may not do so except in the circumstances mandated by the section. Those conditions were not satisfied. I am prepared to say that even if section 20.4(2) confers a discretion, the learned judge was correct in refusing to exercise his discretion in favour of granting the amendments sought, as Paulette Bailey's witness statement had been filed before the Pre-Trial

Review. At that time the amendments sought were only in respect of substituting the name Ina Bailey for Evadney Bailey. It is my view that having regard to the history of the matter, the learned judge correctly exercised his discretion in accordance with the overriding objective of the Civil Procedure Rules, 2002.

33. For reasons stated herein, it seems to me that the appeal against the order of Campbell J has little chance of succeeding and accordingly I would set aside the permission granted to appeal. I would also make an order for costs to the church.

ORDER:

1. Application to set aside leave to appeal granted by Campbell J on October 22, 2004 is hereby granted.
2. Costs ordered in favour of the Church.